8-22-2014

Humphries v. Becker Appellant's Brief Dckt. 41897

IN THE SUPREME COURT OF THE STATE OF IDAHO

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ROBERT HUMPHRIES and BECKY HUMPHRIES, husband and wife, Plaintiffs-Appellants, v. EILEEN BECKER, an individual; ALLEN and JANE BECKER, husband and wife; Defendants-Respondents, and SHEILA B. ADAMS, an individual; JERRY HINES, an individual; CENTURY 21 RIVERSIDE REALTY, an Idaho general partnership; JOHN DOES 1-10; and CORPORATIONS XYZ and/or other legal entities, Defendants.	)	41897 Supreme Court No. 38407-2011 District Court No. CV 2011-691

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Cassia

Honorable Jonathan Brody, District Judge, Presiding

Richard J. Worst (ISB No. 4842)
David W. Gadd (ISB No. 7605)
Kirk A. Melton (ISB No. 8707
WORST, FITZGERALD & STOVER, PLLC
905 Shoshone St. N
P.O. Box 1428
Twin Falls, ID 83303-1428
Telephone: (208) 736-9900
Facsimile: (208) 736-9929
E-mail: worst@magicvalleylaw.com
Attorneys for Appellant

Brooke B. Redmond (ISB No. 7274)
WRIGHT BROTHERS LAW OFFICE, PLLC
1166 Eastland Dr. N
P.O. BOX 226
Twin Falls, ID 83303
Telephone: (208) 733-3107
Facsimile: (208) 733-1669
e-mail:
BRedmond@WrightBrothersLaw.com
Attorneys for Appellee

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STATEMENT OF THE CASE

A. Nature of the Case.

This case arises from a transfer of real property in which appellants, Robert and Becky Humphries (the "Humphries") claim that the respondents, Eileen Becker, Allen Becker, and Jane Becker (collectively the "Beckers") committed fraud by misrepresenting, concealing, and/or failing to disclose material information with regards to the source of water to the property and the functionality of the sprinkler system. Despite making representations about the source of water for the real property, the Beckers did not disclose that the sprinkler/irrigation water came from a source to which they had no rights. In addition, they represented that the sprinklers were fully automatic when, in fact, they were not.

B. Course of Proceedings.

The Humphries filed suit against the Beckers in this case and alleged two counts of Fraud, Misrepresentation, and Fraudulent Inducement of Contract, and one count of a violation of the Idaho Property Disclosure Act. On the Beckers' motion for summary judgment, the district court granted summary judgment against the Humphries, determining that the Beckers did not make any false representations and therefore, the Humphries could not recover on their claims.[1] The Humphries moved the district court to reconsider, and the district court denied the Humphries' motion. More specific information regarding the proceedings will be addressed in the Statement of Facts, below.

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[1] The district court only ruled on whether the representations were false. Therefore, that is the only element of the Humphrieses' claims that is addressed in this appeal.

C. Statement of Facts.

Allen and Jane Becker owned a one-acre property (the "Property"). R. MD 2, L. 20.[2] The Property had two sources of water. *Id.* 3, L. 10-12. The water delivered to the house on the Property originated from a well ("Shared Well") that was located on the neighboring property ("Shared Well Property") of Eileen Becker. *Id.* The water servicing the sprinkler system for the yard, however, originated from a neighboring farmer's well and pivot (the "Farm Well"). *Id.* The Beckers had no legal right to that Farm Well or the water derived therefrom. R. 88, L. 5-8. The Property itself had no inherent rights to the farm water either. *Id.* Before selling the property, Allen Becker inquired as to how much it would cost to obtain a well to support the Property itself. R. 266, P. 36 L. 14 – P. 37 L. 7. After finding out it would cost approximately $30,000.00, Allen decided not to put a separate well on the Property. *Id.* at 267, P. 37 L. 1-7, P. 41, L. 14-17. The sprinkler system connected to the Farm Well was partially automatic, with five of the seven stations requiring manual starting and stopping. R. 89, L. 15-16, R. 90, L. 20-23.

In late 2008, Allen and Jane traded Eileen the Property for the Shared Well Property. R. MD. 2, L. 21-23, R. 264, P. 24, L. 1-15. Eileen never lived at the Property before listing the property for sale. R. MD. 2 L. 23, P. 3 L. 1. Having lived at the adjacent Shared Well Property, Eileen knew that the sprinkler water for the Property came from the Farm Well and not the Shared Well. R. 82, L. 25, R. 83, L. 1-7. Eileen enlisted the help of Sheila Adams, a realtor, to sell the Property. R. MD. 3, L. 3-5, R. 257, P. 55, L. 10-25, P. 56, L. 1-3. During the listing and sale

[2] The district court's Memorandum Decision Granting Defendants' (Eileen, Allen, and Jane Becker) Motion for Summary Judgment was not included in the original record. Upon stipulation of the parties, the record was augmented with this document. As Appellants are unaware what the official designation of this document will be, it will be referred to as "R. MD."

process, Allen and Jane Becker also acted as "middlemen" and representatives of Eileen. R. MD. 3, L. 4-5. R. 80, L. 21-25, R. 81, 1-11. The Beckers provided information to Ms. Adams in order to list the Property for sale. R. MD. 3, L. 4-5, R. 78-81, 92. Specifically, Ms. Adams testified that the Beckers told her that when Allen and Jane owned the Property, they would use the Farm Well but that the use would not continue because the Beckers did not have a right to it. R. 379, L. 1-16, R. 472, L. 20-22, R. 473, L. 1-5. The Beckers represented to Ms. Adams that the Shared Well could provide water to the Property's yard, so long as everything else was not turned on at the same time. R. 473, L. 5-7, R. 492, L. 15-18. Ms. Adams understood from the Beckers' characterizations of the sources of water, that the water from the Farm Well had been merely supplementary and was not necessary to meet the Property's water needs. R. 718, L. 15-22. Ms. Adams also believed, based upon the Beckers' representations, that the Shared Well was connected to the sprinklers and the source for the irrigation water. R. 497, L. 4-9. This was false as the sprinklers received their water from the Farm Well since 1983. R. 265, P. 28, L. 6-12. Ms. Adams understood that there was only one source of water, the Shared Well, for the entire Property. R. 490, L. 2-17. Allen Becker knew that the pipe from the Shared Well to the Property was only an inch in diameter and was never intended to run the sprinkler system. R. 520, L. 10-15.

Based upon the information provided by the Beckers, Ms. Adams created a listing (the "Listing") wherein under "Water" it states "Shared Well," and under "Lawn Sprinklers" it states "Auto" and "Full." R. 101. The Listing goes on to state, "Well shared with Becker home to the south on agreement being drawn." *Id.* The Listing contains nothing that would indicate that the Shared Well was not connected to the sprinklers or that the Farm Well was the source of water to

the sprinklers, much less that the seller did not have rights to the Farm Well Water. *Id.* The Beckers knew that prospective buyers would rely upon that listing for information about the property. R. 75, L. 3-14, R. 79, L. 1-5, 92, L. 2-12. Eileen authorized Ms. Adams to publish the Listing. R. 78, L. 22-25.

On about October 7, 2008, Eileen signed a RE-25 Seller's Property Condition Disclosure Form (the "Disclosure") and adopted the statements therein. R. 83, L. 12-14, R. 104-107. On the second page of the Disclosure, both the domestic water and irrigation water are checked off as being provided by a "Private System." R. 105. There is no indication as to what that private system is, that there were actually two different systems (i.e. Shared Well and Farm Well), or that the seller lacked rights to the water connected to the sprinkler system. *Id.* Ms. Adams believed that the Disclosure was accurate because she understood that there was only one source, the Shared Well, of water for the Property. R. 498. L. 5-23. Ms. Adams acknowledged that had she known that the Farm Well supplied the water for the sprinklers, "Other" would have been the more appropriate selection on the Disclosure. R. 509, L. 13-18.

Toward the end of 2008, Ms. Adams retired and another real estate agent, Jerry Hines, took over the representation for the Property. R. 474. L. 12-15. Mr. Hines acknowledged that had he been an agent representing a buyer for the Property and reviewed the Listing and Disclosure, he would have assumed that the sprinklers were attached to the Shared Well. R. 641, L. 5-12. He also acknowledged that the Beckers should have disclosed that the sprinkler system was not connected to the Shared Well. R. 641, L. 13-22.

The Humphries were interested in the Property and reviewed the Listing and the Disclosure prior to making an offer. R. 458, L. 4-8. Based upon the Humphries' visit and review of the documents, they were led to believe that the Shared Well was the only source of water to the property. R. 458, L. 9-13. The Humphries submitted an offer on the Property, and it was accepted. This was the Humphrieses' first home. R. 231, L. 20-25, R. 249, L. 15. The Humphries hired an inspector, who reviewed the Property at a time when the ground was covered in snow. R. 556, L. 1-23. After the inspection, the Humphries negotiated a price reduction for issues that came back unsafe or deficient. R. 231, L. 18-25, R. 232, L. 1-6. The inspector did not test the sprinkler system due to the exterior temperature. R. 412. However, the inspector was also under the assumption that the sprinklers were fully automatic. *Id.* Ms. Adams also agreed that there was no way to test the sprinkler system at the time of year when the Humphries purchased the Property. R. 510, L. 10-13.

Robert Humphries testified that had the Humphries known the true information about the sources of water and the sprinklers, the Humphries would not have purchased the Property or would have offered significantly less for it. R. 458, L. 23, R. 459, L. 1-3. Ms. Adams recognized that the Humphries would have had no way of knowing about the Farm Well from the documents she prepared. R. 494, L. 17-20. Allen Becker also acknowledged that he did not know how the Humphries could have known about the two separate sources of water based upon the information provided in the Listing and Disclosure. R. 529, 12-23.

Eileen sold the Property to the Humphries on February 10, 2009. R. MD. 3, L. 1-2. At closing, the Humphries were introduced to the Shared Well Agreement (the "Agreement"). R. 652, L. 4-5. The Agreement addresses the Shared Well on the Shared Well Property that provides

"domestic water" to Shared Well Property and the Property. R. 185-88. At no place in the Agreement does it provide a definition of "domestic water" or "domestic purposes." R. 185-88. At the time of closing, the Humphries believed that the Agreement covered water usage for the entire Property. R. 558, L. 22-25, R. 606, L. 7-25. In fact, neither Mr. Hines nor Ms. Adams, both of whom are experienced real estate agents, knew the exact extent of what "domestic purposes" would mean. R. 392, L. 16-25, R. 93, L. 1-5, R. 402, L. 23-25, R. 403, L. 1-12.

The Humphries filed a complaint against Eileen Becker. During the proceedings, the Humphries moved to amend the complaint to add Allen and Jane Becker as defendants and to add a claim of punitive damages. R. 33-34. Eileen Becker, who was the only defendant at the time of the motion, opposed the motion taking the position that the representations of "Shared Well" on the Listing and "Private" on the Disclosure for irrigation water were technically correct and therefore not misrepresentations as the Farm Well was shared and private, even though neither the Property nor seller had any right to it. Tr. 9-11. Eileen also argued that the Agreement signed at closing limited the Shared Well use to domestic purposes only. Tr. 9, L. 19-22. Despite Eileen's arguments, the district court ruled that there was "a reasonable likelihood of proving the facts that meet the standard that by clear and convincing evidence the defendant acted fraudulently, oppressively, what have you." Tr. 22, L. 11-15.

Subsequently, the Beckers moved for summary judgment. R. 135-137. The court granted summary judgment. *See, generally*, R. MD. In so ruling, the district court noted that the reference to a "private system" was a true statement as the Farm Well was private and, if the sprinklers were

connected to the Shared Well, that the Shared Well would also be a private system. R. MD 7, L. 10-14. The court determined that the representation was, therefore, not false. *Id.*

The district court also held that the Listing reference to a "Shared Well" was not a false statement. R. MD. 8-9. The district court then determined that the Agreement "was sufficient disclosure of the source of irrigation water to satisfy any duty of disclosure the Beckers may have had." R. MD. 9, L. 22-23. In order to reach this conclusion, the district court employed a definition of "domestic purposes" found in Idaho Code § 42-111(1) without any discussion as to why or how that definition applied to the Agreement. R. MD. 8, L. 22-23, P. 9, L. 1-6.

Finally, as to the automatic nature of the sprinklers, the district court found that [t]here is no evidence indicating that the Humphries placed considerable import on the fully automatic system" and ruled that whether the sprinklers were automatic was not material. *Id.* at 11, L. 3-5, 15-17.

The Humphries filed a motion for reconsideration, arguing that issues of material fact remained and that evidence existed, in the form of testimony from Robert Humphries, as to the materiality of the automatic sprinkler system to the Humphries. R. 658-73. The district court held, again, that the representations were not false because the source of the irrigation water was a private system, "regardless of whether the water comes from the farm well or the shared well." R. 699, L. 8-9. The district court also addressed Robert Humphries' testimony, acknowledging that the court found the testimony "unpersuasive" and unsupported by specific facts. R. 700, L. 7-10. The district court entered judgment in favor of the Beckers and awarded them attorney's fees and costs. R. 736, 746-52, 758.

The Humphries filed this appeal.

ISSUES PRESENTED ON APPEAL

1. Did the district court err in finding that, as a matter of law, no issue of material fact existed as to the Humphries' fraud claims?
2. Did the district court err in finding that, as a matter of law, no issue of material fact existed as to the Humphries' Idaho Property Condition Disclosure Act?
3. Did the district court err in granting an award of attorney's fees to the Beckers?
4. Are the Humphries entitled to an award of attorney's fees and costs on appeal based upon the underlying contract and Idaho Appellate Rules 40 and 41?

STANDARD OF REVIEW

"Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In evaluating the record on appeal from a summary judgment, the facts, and the inferences to be drawn from the facts, are to be construed in the light most favorable to the party opposing the motion." *Bunker Hill Co. v. United Steelworkers of America*, 107 Idaho 155, 157, 686 P.2d 835, 837 (1984). On appeal, the Court is to "liberally construe the facts in the existing record in favor of the nonmoving party, and to draw all reasonable inferences from the record in favor of the nonmoving party." *Anderson v. City of Pocatello*, 112 Idaho 176, 179, 731 P.2d 171, 174 (1986). "Circumstantial evidence can create a genuine issue of material fact." *Id.* If conflicting inferences can be drawn from the evidence and reasonable minds could reach different conclusions, summary judgment must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979). "All doubts are to be resolved against the moving party...." *G&M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517, 808

P.2d 851, 854 (1990). "The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact." *Id.*

ARGUMENT

I.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE HUMPHRIESES' FRAUD CLAIMS.

A. The evidence in the record demonstrates that there is a genuine issue of material fact as to what representations were made by the Beckers.

The district court granted summary judgment, determining that the Beckers' representations were not false. The district court erred when it determined the meaning and significance of the Beckers' representations. Through the Disclosure, the Beckers represented that the irrigation water was provided by a "private" system. R. MD. 7, L. 7-10. The district court determined that this statement was true because 1) the irrigation water was supplied by a "private" source—that of the neighboring Farm Well and 2) the irrigation water "could also be provided" by the Shared Well. R. MD 7, L. 10-14. Through the Listing, the Beckers disclosed only one source of water to the property—the "shared well." The district court determined that the Disclosure was either 1) truthful because the Shared Well did provide water to the property or 2) cured by the Agreement. R. MD 8-10.

1. The Disclosure, at minimum, creates an ambiguity to be resolved by the jury.

The district court improperly granted summary judgment because there are genuine issues of material fact concerning what representations were made in the Disclosure, which Disclosure, at a minimum, created an ambiguity. A representation is ambiguous as a matter of

law when it is subject to multiple, reasonable interpretations. *See Chavez v. Barrus*, 146 Idaho 212, 192 P.3d 1036 (2008) (holding that the question of whether an instrument is ambiguous is a question of law and that an instrument is ambiguous if it is reasonably subject to conflicting interpretation).

"Ambiguity in a representation presents questions of fact for determination by the jury as to the meaning of the statement, and the meaning which the person making intended it should convey to the person to whom it was made." 37 Am. Jur. 2d Fraud and Deceit § 59. By evaluating the "truthfulness" of the representation, the district court considered two possible meanings for the representation—that it meant the Farm Well or the Shared Well. R. MD. 7 The fact that there are two possible meanings that may be attached to that representation renders it ambiguous and creates a question of fact for the jury to determine. Additionally, both meanings are either false or misleading, creating another issue of material fact precluding summary judgment.

If the Disclosure's representation of a "Private System" was intended to reference the Shared Well, then the representation was explicitly false. The sprinkler system for the Property has not been, at any time, connected to the Shared Well. Although the district court found that the irrigation system could be set up to the Shared Well, it was not at the time of the representation—which makes the statement false—and ample evidence demonstrates that such an option is not a realistic possibility. For example, such evidence would include, but not be limited to, the Humphrieses' understanding that such a connection to the Shared Well would be illegal, that the pipe in place from the Shared Well to the Property cannot support irrigation and

any other use at the same time, that Allen Becker knew that the connection between the Shared Well and property was never intended for irrigation purposes, and that the Agreement, as interpreted by the district court, does not allow for irrigation. Therefore, if the Disclosure meant the Shared Well, it was a false statement. Regardless, the issue presents multiple genuine issues of material fact.

If the Disclosure was intended to reference the Farm Well, then an issue of material fact remains as to whether that representation was misleading as the Property and Beckers had no rights to the Farm Well, which was clearly necessary to irrigate the Property. The most reasonable inference that can be drawn from a representation on a disclosure form is that it refers to rights pertaining to the property. This means that as a potential buyer is reading a property disclosure form, the buyer will assume that the disclosures therein pertain to the property or that the seller has the right to convey them.

Not only is it reasonable that the Humphries would read the Disclosure and believe that the representation of a "private" irrigation water source meant that it was appurtenant to the Property, and that the Property or owner had rights to convey the same as part of the sale, but it is the most reasonable inference to be drawn from that representation. Even the Beckers' real estate agent, Ms. Adams, implicitly acknowledged what inference would likely be drawn from the marking of "private" when she admitted that had she known about the Farm Well, "other" as opposed to "private" would have been checked on the Disclosure. Such an inference is sufficient by itself to preclude summary judgment since this Court is to review the decision of the district court and "liberally construe the facts in the existing record in favor of the nonmoving party, and

to draw all reasonable inferences from the record in favor of the nonmoving party." *Anderson v. City of Pocatello*, 112 Idaho 176, 179, 731 P.2d 171, 174 (1986). Therefore, if the Disclosure referred to the Farm Well, then issues of material fact remain as to whether the representation was misleading as the Beckers did not have any right in the Farm Well to convey.

2. An issue of material fact remains as to what was meant by the representation of a "shared well" under "water" in the Listing.

The district court improperly determined that the representation that the Property received its water from a "shared well" on the Listing was not false and any misleading nature of it was cured by the Agreement. R. MD. 8-10. In making its determination, the district court ignored the other, more reasonable inferences, that could be drawn from that representation. Those other inferences create an issue of fact as to what exactly was represented by the Listing.

It appears that the district court interpreted the "shared well" representation on the Listing as the Shared Well. R. MD 8 ("Once again, this representation is not false. The source for the water is a shared well."). However, there is at least one other inference that could be drawn which renders this representation untrue or misleading.

The most reasonable and logical inference to be drawn by only listing the Shared Well as the water source for the Property is that the Shared Well was the **only** water source to the Property. From that inference, a potential buyer, like the Humphries, would reasonably believe that the water in the house and the irrigation water all came from that Shared Well as the Property has sprinklers and no other water source is listed. However, the sprinkler system was not, in fact, connected to the Shared Well and actually drew from another water source—the

Farm Well, which was not disclosed. Therefore, in representing the "Shared Well" as the only source of water, a reasonable inference could be drawn that the Beckers misrepresented the Property's sources of water by not listing or disclosing the Farm Well and its relationship to the Property.

The Humphries recognize that the Farm Well could be characterized as a "shared well" and an argument could be made that disclosure of a "shared well" encompassed the Farm Well. However, such an argument would fail for three reasons. First, the entire concept of whether the "shared well" would mean the "Farm Well" is an issue of fact as to what the representation actually meant and therefore summary judgment was inappropriate. Second, if the Farm Well can be considered a "shared well," then the representation of "shared well" is misleading as it is singular, encompassing only one well, and not plural—which would be more accurate to describe the Property being serviced by both the Shared Well and Farm Well. Lastly, on the same page of that disclosure, it states that, "[w]ell shared with Becker home to the south on agreement being drawn." That confirms that the reference to the "shared well" meant the Shared Well and not the Farm Well as the Farm Well was never part of the Agreement.

Liberally construing the facts and drawing all reasonable inferences in favor of the Humphries, there remain material issues of fact as to what was meant by the "shared well" representation on the Listing and whether that representation was misleading.

3. A material issue of fact remains as to whether the Disclosure and Listing, in conjunction, created a misrepresentation and whether that misrepresentation was cured by the Agreement.

The Disclosure and Listing, which were reviewed by the Humphries prior to making an offer, create a misrepresentation. In the Disclosure, both the source of the domestic water and the source of the irrigation water are marked as "private." In the Listing, the only source listed for the water is a "shared well." Even the district court noted that the combination of these two representations "is potentially misleading." R. MD 8, L. 4-5.

However, the district court improperly determined that the "potentially misleading" representation was somehow cured by the Agreement. In making its finding, the district court referred to the undefined term "domestic purposes," found in the Agreement, and, invoking the definition for "domestic purposes" in Idaho Code § 42-111(1), determined that "[a] proper understanding of the terms of the [A]greement would have led the Humphries to understand that they would not be able to irrigate the entire property with the domestic well." R. MD 8-9. With that, the district court somehow determined that no representation occurred as to what water sources serviced the property.

The district court's analysis is in error for two reasons. First, there is an inherent disconnect between the representation of a single source of water for the Property and the fact that the Property is actually dependent upon two sources of water. That disconnect creates an issue of fact. It is as though the district court determined that the Humphries should have been able to guess that the disclosures meant something entirely different from what was expressly stated—that there were actually two sources of water and not one. Second, the district court

applied the definition found in a statute without any discussion or explanation of how the Agreement applied to any of the statutes referenced in Idaho Code § 42-111(1) to which that definition is expressly confined. Again it seems that the district court expected the Humphries to engage in divination—to guess that in the future a court may utilize a definition of "domestic purposes" found in the Idaho Code and therefore they should consult the Idaho Code in order find out how it defines the term even though the Agreement makes no reference to the code. Such an expectation of a first-time homebuyer like the Humphries is unreasonable especially when considering that the two experienced real estate agents representing the Beckers were unable to explain what "domestic purposes" meant with certainty.[3] Based upon the inferences the Humphries drew from the Beckers' prior representations, the Humphries had no reason to believe that the Agreement would not cover their entire property and that they should investigate further in order to confirm other sources of water upon which the Property depended upon and for which the sellers had no right.

B. The evidence in the record demonstrates that there is a genuine issue of material fact as to whether the representations made by the Beckers were misleading or false.

Looking at the reasonable inferences that could be drawn from the Beckers' representations, there are multiple material issues of fact that preclude summary judgment. Rather than address the totality of the circumstances in a piecemeal fashion, as the district court did, the Humphries will demonstrate that, at the very least, material issues of fact remain as to whether the Beckers misrepresented the water sources for the Property.

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[3] Jerry Hines, R. 402-03; Sheila Adams, R. 392-93.

The Beckers made two representations about the water sources. In the Disclosure, the Beckers noted that both the domestic and irrigation water were sourced by "private" means. It is reasonable that any prospective buyer would infer that the seller or the Property had rights to the "private" source or sources, if there were more than one.

In the Listing, only one water source was noted—"shared well." Being singular and being the only listed water source, a reviewer of the Listing could reasonably infer that all of the water supplied to the Property came from a singular, shared well.

Reviewing the Disclosure and Listing together, any uncertainty about whether the domestic water and irrigation water came from the same "private" source could be eliminated by the inference that one "shared well" was the water source for the property. On that same document, the source is further clarified as the Shared Well because the document states, "[w]ell shared with Becker home to the south on agreement being drawn."

Even though these representations address the water source for the property, they give no indication that the sprinklers were attached to a different source than the house. In fact, the witnesses involved admit that the Humphries would have had no way of knowing about the Farm Well by reviewing these two documents.[4]

It is reasonable that the Humphries would have gone to the closing believing, based upon the representations made by the Beckers, that the Property was adequately and entirely serviced by one water source—the Shared Well. Being presented with the Agreement and with no other hint or indication prompting the Humphries to consider that the sprinklers may be sourced by the

[4] Ms. Adams, R. 386-87, 498; Mr. Hines, R. 641; Allen Becker, R. 529.

Farm Well, the Humphries would have had no reason to believe that the entire one acre Property would be provided with water under the "domestic purposes" of the Agreement. The fact that the term was not defined and the Beckers' two real estate agents could not give a definite definition of "domestic purposes" shows that the presence of there is a reasonable inference that a first-time homebuyer would not question the Beckers' prior representations of the Shared Well servicing the entire Property.

A liberal construction of the facts and drawing all reasonable inferences in favor of the Humphries, the Beckers' representations, not making any reference to the Farm Well, were misleading and therefore, summary judgment in favor of the Beckers was not appropriate.

C. The evidence in the record demonstrates that there is a genuine issue of material fact as to whether the Beckers breached their duty to disclose the source of the water to the sprinkler system.

Even if it could be found that there is no issue of material fact as to whether the Beckers' representations were misleading, those representations triggered a duty to disclose—a duty that the Beckers breached. The duty to disclose additional information is triggered in three situations: "(1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it." *Sowards v. Rathbun*, 134 Idaho 702, 707, 8 P.3d 1245, 1250 (2000).

The district court acknowledged that the Beckers' representations, without more, were "potentially misleading." R. MD 8, L. 4-5. The Disclosure and the Listing both presented

information about the Property's water source. Neither document made any mention or hinted in any way that the "full" and "auto" sprinkler system on the Property received its water from the Farm Well. Presenting some facts in such a way that the presentations does not accurately reflect the true situation is, at the very least, "a partial statement of the facts" which requires disclosure of additional information "in order to prevent [them] from being misleading."

Additionally, in ruling on the Humphrieses' motion to amend, the district court found that there was a reasonable likelihood that the Humphries would be able to prove that a fraud was committed. Thus, the Court appears to have recognized on two occasions that the representations may be misleading. That, alone, precludes summary judgment. Whether the Beckers breached their duty to disclose is a factual question that must be decided the jury, not the district court.

Notwithstanding, the district court proceeded to weigh the evidence and made the factual determination that the Beckers had not breached their duty to the Humphries, as reflected by its statement that "any duty the Beckers may have had to disclose more about the source of irrigation water was satisfied by the Joint Well Use Agreement." R. MD 9, L. 17-19. Contrary to the district court's determination, the Agreement did not satisfy the duty to disclose more information. The Agreement mentions nothing about the Farm Well or about the "full" and "auto" sprinklers. In order to satisfy their duty to disclose, the Beckers would have had to explicitly disclose that the irrigation water came from another source—a source to which the seller had no rights.

Even if the Agreement could have satisfied the duty to disclose, such a determination on summary judgment is improper, as it invades the province of the jury. The Beckers represented,

from the Disclosure and Listing, that the sprinkler system was connected to and obtained water from the shared well. A reasonable jury could conclude that the Joint Well Use Agreement confirmed the Humphrieses' understanding that the sprinkler system was connected to the shared well, as said Agreement makes no reference to any other source of water to the Subject Property.

In any event, whether the Joint Use Well Agreement satisfied the Beckers' duty to disclose additional information is a factual question that must be determined by the jury. Therefore, summary judgment was improper.

D. The evidence in the record demonstrates that there is a genuine issue of material fact as to whether the Beckers' representations concerning the sprinkler system were material.

The Beckers represented in the Listing that the sprinklers were "full" and "auto" when in fact, only two of the seven sprinkler stations were actually automatic. The district court determined that such misrepresentation was not material and granted summary judgment. In so ruling, the district court impermissibly invaded the province of the jury, as materiality is inherently a question of fact for the jury to decide, and also impermissibly weighed the evidence.

Whether the misrepresentation is material is a question of fact for the jury to determine. Although Idaho appellate courts have not expressly addressed the specific issue, several jurisdictions have held that "[t]he materiality of a misrepresentation is not a matter for the trial court but for the fact-finder." *Ellis v. Liter*, 841 S.W.2d 155, 156 (Ark. 1992); *see e.g., Schurmann v. Neau*, 624 N.W.2d 157 (Wis. Ct. App. 2000); *GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Associates, Inc.*, 537 S.E.2d 677 (Ga. Ct. App. 2000); *Powers v. United Services Auto. Ass'n*, 979 P.2d 1286 (Nev. 1999); *Pitts v. Boody*, 688 So. 2d 832 (Ala. Civ. App.

1996); *Campbell v. Southland Corp.*, 871 P.2d 487 (Or. Ct. App. 1994); *Guild v. More*, 155 N.W. 44 (N.D. 1915); *Calemine v. Samuelson*, 171 Cal. App. 4th 153, 89 Cal. Rptr. 3d 495 (2009). "To prove materiality of a misrepresentation, it is only necessary to show the misrepresented fact was a material *influence* on the decision; it must have been a substantial factor, but it is not necessary that it was the paramount or decisive inducement. This is a question of fact for the fact-finder." *Ellis*, 841 S.W.2d at 156 (italics in original).

This Court should also hold that the materiality of a misrepresentation is a question of fact for the fact-finder. In contracts, Idaho already recognizes that whether a breach was material is a question of fact to be determined by the trier of fact. *Mountain Restaurant Corp. v. ParkCenter Mall Associates*, 122 Idaho 261, 265, 833 P.2d 119, 123 (1992). The Humphries are unaware of any reason why materiality of a misrepresentation should be treated any different than materiality in a breach of contract situation.

The district court invaded the province of the jury by weighing the evidence when it determined that the sprinkler system representation was not material. The "weighing of evidence and a determination of a witness's credibility…is improper in a motion for summary judgment." *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). In its Memorandum Decision, the district court stated that "[t]here is no evidence indicating that the Humphries placed considerable import on a fully automatic system . . . ." R. MD 11, L. 3-5. This statement completely disregarded the testimony of Robert Humphries that the Humphries "would not have made an offer to purchase the Subject Property or we would have offered to purchase it for significantly less." R. 458-59. After the Humphries invoked that testimony once again on a

motion to reconsider, the district court stated that it "was aware of Robert Humphries' testimony, but found it unpersuasive because it amounts to a bare denial of arguments made by Becker in their Motion for Summary Judgment, and is not supported by specific facts in the record." R. 700, L. 7-10. That minimization of Robert Humphries's testimony not only impermissibly weighed the evidence, but also disregarded the summary judgment cannon that sworn testimony "must be considered truthful." *Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n, Inc.*, 105 Idaho 509, 512 670 P.2d 1294, 1297 (1983).

In fact, Robert Humphries's assertion in his testimony was supported by facts in the record. Robert had previously testified that after the Humphries made an offer on the house and had the inspection, certain safety and adequacy issues prompted the Humphries to ask for and receive a reduction in the price. Based upon the Humphrieses' prior behavior, it is probable that had they known that the sprinklers were not fully automatic, that they would have, at the very least, requested a reduction in the price of the house as they had for other issues they discovered. This fact does not even take into consideration the fact that this was the Humphrieses' first home and the thought of having to convert manual sprinklers to automatic sprinklers may have been overwhelming for them—regardless of the costs or actual difficulty involved. In any event, whether the truth of the sprinklers would have affected the amount the Humphries would pay—and, in turn, whether a mutual price would have been reached and the sale executed—is a question of fact for the trier of fact.

The district court erred when it weighed the evidence and determined that the Beckers' misrepresentation regarding the functionality of the sprinklers was not material.

II.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE HUMPHRIESES' IDAHO PROPERTY CONDITION DISCLOSURE ACT CLAIM

In its Memorandum Decision, the district court held that Eileen Becker did not breach her duties under the Idaho Property Condition Disclosure Act (the "Act") because she "checked the boxes for 'private system' under the only portion of the form dedicated to the source of water." R. MD 12, L. 1-3. It is unclear from the district court's decision whether the Court held that the checking of that box was sufficient because the Farm Well—to which the sprinkler system was connected—was "private" or whether it refers to the Shared Well since the Shared Well was the only water source to which the Beckers had any rights.[5] Either way, the representation is misleading and ignores the fact that an option for selection that was not misleading was available.

The Act requires certain disclosures by the seller of real property. I.C. § 55-2504. The disclosures are designed to "permit the transferor to disclose material matters relating to the physical condition of the property to be transferred, including, but not limited to, the source of water supply to the property...." I.C. § 55-2506. Failure to comply with the Act subjects the seller to liability for the damages suffered by the buyer. I.C. § 55-2517.

If the district court was referring to the Farm Well as "private," then the Beckers' representation was misleading because the Beckers had no rights to convey in the Farm Well.

[5] While previously in its decision, the district court did state that since the "Private System" could have meant either the Farm Well or the Shared Well, in the section addressing the Act, the Court did not expressly clarify whether it was referring to one or both interpretations.

The assumption in a property disclosure is that the water sources would be disclosed and would be sources to which the seller had rights—unless, of course, further explanation is provided. No further explanation was provided identifying the Farm Well as a source of water to the Property and that the buyer would not have any rights to that source. Therefore, referencing the Farm Well as the "private" source of irrigation water violated the Act, and summary judgment was not appropriate.

If the district court was referring to the Shared Well as the source identified by the Beckers in the Disclosure, then the Beckers' representation was misleading because the sprinkler system was not connected to the Shared Well, a fact which the Beckers knew prior to selling the Property.

The district court ignored the fact that the Beckers could have chosen a less misleading option, such as "other," checked no box at all, or written in that the buyers would have no right to the irrigation water source. Considering that the Shared Well was not connected to the sprinklers and that the Beckers had no rights to the Farm Well, "other" would be a much less misleading selection. Even the Beckers' real estate agent who listed the property for them stated that had she known the true nature of the sprinkler system, that "other" would have been the more appropriate selection. Such a selection, at the very least, would give buyers an indication that there was something about the irrigation water that they needed to inquire about. Additionally, considering the marking of "private" is misleading, the Beckers could have written in a clarification so that the selection was not misleading. The Beckers did neither and simply misled potential buyers by representing the irrigation source as "private."

The very fact that it is unclear which water source the Beckers were referring to when marking "private" creates an issue of material fact. A subsequent issue of material fact arises as to the misleading nature of whichever water source the Beckers were representing under "irrigation source," whether it be the Shared Well—which was not connected—or the Farm Well—to which the Beckers had no rights. Therefore, issues of fact remain as to whether the Beckers complied with the Act.

III.

THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES TO THE BECKERS

The district court erroneously granted summary judgment in favor of the Beckers. Subsequently, the district court granted an award of attorney's fees for the Beckers, as the prevailing party. R. 746-52. "In order to be awarded attorney's fees, one must be a prevailing party." *Smith v. Whittier*, 107 Idaho 1106, 1108, 695 P.2d 1245, 1247 (1985). However, summary judgment was inappropriate, and therefore the Beckers are not entitled to attorney's fees. *See Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 637 (2001) (vacating an award of attorney's fees after reversing the grant of summary judgment).

IV.

THE HUMPHRIES ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS ON APPEAL UNDER THE UNDERLYING CONTRACT AND IDAHO APPELLATE RULES 40 AND 41

The underlying contract which served as the basis of sale of the Property, provides that, "[i]f either party initiates or defends any arbitration or legal action or proceedings which are in

any way connected with this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal." R. 419.

This court should award costs and attorney's fees incurred on appeal. The district court erred when it granted summary judgment. There were numerous issues of material fact that should have precluded summary judgment, and the district court's decision should be reversed. Upon reversal, this Court should award the Humphries costs and attorney's fees as the prevailing party. *See Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n, Inc.*, 105 Idaho 509, 670 P.2d 1294 (1983) (awarding costs to the appellant who successfully challenged the trial court's grant of summary judgment to the appellees).

CONCLUSION

The Beckers made various representations about the water source to the Property. However, none of those representations gave any indication that the irrigation water source was one to which the Beckers had no right to convey. There is enough evidence to show that those representations were misleading, giving rise to the false statement/misrepresentation element of fraud. At the very least, whether those representations were misleading are questions of fact for the trier of fact to determine. Therefore, summary judgment was inappropriate and the Humphries ask this Court to reverse the district court's decision and remand so that this case may be appropriately tried before a jury.

DATED this 21st day of August, 2014.

WORST, FITZGERALD & STOVER, P.L.L.C.

By: _____
KIRK A. MELTON

CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of August, 2011, he caused two (2) true and correct copies of the foregoing instrument to be served upon the following persons in the following manner:

Brooke B. Redmond
WRIGHT BROTHERS LAW OFFICE, PLLC
P.O. Box 226
Twin Falls, ID 83303

(x) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile
(208) 523-9518

KIRK A. MELTON